

LUCKER v. PHOENIX ASSUR. CO. OF LONDON.

(Circuit Court, D. South Carolina. March 5, 1895.)

1. REMOVAL OF CAUSES—TIME OF FILING TRANSCRIPT.

While, upon removal of a cause from a state to a federal court, security is required that the transcript shall be filed on the first day of the next succeeding term, the federal court is not to be deprived of jurisdiction if the transcript is filed at a later day in the term, but, for good cause, may permit it to be filed at such later day.

2. DISTRICT OF SOUTH CAROLINA—DIVISION.

The district of South Carolina, though divided into Eastern and Western divisions, is one district, and the terms of the circuit court, though held at different places, in different parts of the state, are all held for the entire district.

This was an action by Minnie Lucker against the Phoenix Assurance Company of London, a corporation created by and under the laws of Great Britain. The action was brought in a court of the state of South Carolina, and was removed by defendant to the United States circuit court. Plaintiff moved to remand to the state court.

Bryan & Bryan, for the motion.
Trenholm, Rhett & Miller, contra.

SIMONTON, Circuit Judge. This is a motion to remand. The plaintiff began an action against the defendant in the court of common pleas for Charleston county, S. C., on 10th January, 1895. The defendant, a few days before the time for answering had expired, filed in the office of the clerk of the state court its petition and bond for removal into this court, upon the ground of diversity of citizenship. No term of the state court was then being held, nor has any been held since that time, to which the petition and bond could be presented. An order for removal has been passed by a circuit judge of the state at chambers, but this is clearly irregular. When the petition, with bond, was filed the November term of this court was current. This term ended 2d of February, 1895, and the Greenville term began on first Monday (4th) of February thereafter. No steps having been taken by the defendant to transmit the record to this court on the first day of the session thereof next after the filing of the petition for removal, the plaintiff on 28th of February last filed with the clerk of this court a certified copy of said record, and now moves to remand the cause for this default of the defendant. The defendant appeared to this motion, and stated orally in argument his reason for the default. The proper practice, when a motion to remand is made, is that the moving party should file a petition in writing setting forth the grounds for the remand, and the petition should be traversed or otherwise pleaded to by the resisting party. The present case will be treated as a demurrer to the facts set out in the motion of the plaintiff. The ground upon which the defendant resists the motion is that the bond for removal provides for filing the record in this court on the

first day of the next sitting thereof in the district in which the cause is brought; that this cause was brought in the Eastern district of South Carolina, and that the first term of the circuit court for this district is the first Monday in April next, and not in Greenville, on first Monday in February, because Greenville is in the Western district. There has been some confusion with regard to the division of the district of South Carolina into Eastern and Western districts. The bar have entertained great doubt as to the effect of this division. But the district of South Carolina has never been abolished, and all doubt has been removed by the act of congress approved 26th April, 1890 (26 Stat. 71). That act makes one circuit court for the district of South Carolina, and creates for it four regular terms,—in the city of Greenville, first Monday in February and first Monday in August in each year; in the city of Columbia, fourth Monday in November; and in Charleston, first Monday in April. The term of this court next after the filing of this petition, on the first day of which the record should have been in this court, was the first Monday in February. The defendant, therefore, is in default. But, while the act of congress requires security that the transcript shall be filed on the first day of the term, it nowhere appears that this court is to be deprived of the jurisdiction if it be filed at a later date in the term. *Removal Cases*, 100 U. S. 475; *Railroad Co. v. Koontz*, 104 U. S. 16. This is a matter within the discretion of the court. If the cause assigned for the delay is satisfactory to the court, it can permit the record to be filed after the first day of the term. *Railway Co. v. McLean*, 108 U. S. 217, 2 Sup. Ct. 498; *Hall v. Brooks*, 14 Fed. 113. The courts jealously guard against any use of the privilege of removal for the purposes of securing delay in the trial of a cause. The application must be made in good faith. The counsel who argued this motion for the defendant assured the court that he was honestly of the opinion that the next succeeding term was that in April. His statement is amply sufficient. Besides this, had this record been filed to the February term, by the rule and usage of this court, adopted for the convenience of parties, counsel, and witnesses, a continuance could have been had as of right to the April term. So no delay in this court has resulted from the omission. The situation in this district is very like that in the Eastern district of Virginia. The court there sits at Norfolk, Alexandria, and Richmond. In each of these cities there is a distinct bar, not practicing in the other cities, and the distances are great between them. Judge Hughes protects removal of causes originating within the territory of each of these cities to the court sitting therein. *Cobb v. Insurance Co.*, Fed. Cas. No. 2,921. In this district we have Greenville in the western part of the state, Columbia in the middle, and Charleston on the seaboard. For reasons similar to those governing Judge Hughes, this court has adopted the rule and usage above referred to. The explanation given by defendant's counsel is satisfactory, and the motion to remand is refused. But defendant, being in default, is put on terms. The defendant must file his transcript in this court within three days from the date of this order, the de-

fense to the action must be filed within ten days from this date, and the cause will be called for trial on the first Wednesday of the April term of this court next hereafter.

WESTERN ELECTRIC CO. v. REEDY.

(Circuit Court, S. D. Ohio, W. D. February 25, 1895.)

No. 4,540.

1. DEFAULT DECREES—MOTION TO VACATE—EQUITY JURISDICTION.

A suit in equity for infringement of a patent was commenced before the patent expired, and after its expiration a decree by default was entered for injunction and accounting. The testimony adduced before the master by complainant related entirely to a different patent, which concerned the same subject-matter, but which had expired before the suit was commenced. *Held*, that these facts did not show such want of equity jurisdiction as would compel the court to set aside the decree on motion.

2. SAME.

After a decree by default, respondent is debarred from setting up the defense of an adequate remedy at law; and, while the court may itself interpose it, there is no obligation to do so, and the matter rests in its discretion.

This was a suit in equity by the Western Electric Company against Henry J. Reedy for infringement of a patent. Defendant moved to set aside a decree by default.

Barton & Brown and R. de V. Carroll, for complainant.
Cobb & Howard and L. M. Hosea, for respondent.

SAGE, District Judge. The suit is upon patent No. 172,993, issued February 1, 1876, to the Western Electric Manufacturing Company, as assignee of Elisha Gray, the inventor, for improvements in electric annunciators for elevators. The defendant being in default, a decree pro confesso for the complainant was entered March 20, 1893, and on the 1st of May, 1893, the decree for an injunction and an account was entered. The defendant moves to set aside the default and dismiss the case for want of jurisdiction, on the ground that it appears from the testimony taken before the master that the averments of the bill are not true, and that the assumptions upon which the default was rendered were erroneous. Counsel urge that it is now apparent that by reason of the expiration of the Hahl patent (owned by the complainant, dated March 10, 1874, and being for an improvement in electric indicators for elevators) before this suit was begun there was no infringement whatever by the defendant. These, it is said, are jurisdictional facts, which appear in the testimony presented before the master by the complainant in his own behalf, and bear upon the averments of infringement made by the bill. The testimony before the master does not show that the defendant put any annunciators in elevators, excepting flexible cable annunciators. That "flexible cable" annunciators are covered by the Hahl patent was held in *Western Electric Manuf'g Co. v. Chicago Electric Manuf'g Co.*, 14 Fed. 691.